

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2022/0009

IN THE MATTER OF The Attorney
General's Reference Act No. 17 of 2021 of
the Laws of Montserrat

and

IN THE MATTER OF the Interpretation of
Section 7(2)(d) of the Constitution of
Montserrat Cap. 1.01 of the Laws of
Montserrat

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Eddy Ventose

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Renee Morgan for the Attorney General
Mr. Steven Fagen and Ms. Marie Carole Lidbetter as Interested Parties

2023: September 20;
November 06.

OPINION OF THE COURT OF APPEAL

- [1] **VENTOSE JA [AG.]:** On 7th December 2022, the Attorney General of Montserrat, pursuant to section 3 of the **Attorney General's Reference Act**,¹ referred five (5) questions for the determination of this Court. Having considered the questions, the Court determined that only the following two questions were appropriate for the Court to hear and determine, namely:

¹ No. 17 of 2021 of the Laws of Montserrat.

- (1) Whether, in view of the accused's right to legal representation under section 7(2)(d) of the **Constitution of Montserrat**,² the High Court may determine, before trial on indictment takes place, that a count on indictment may be dismissed as an abuse of process if the accused does not receive financial assistance from the State to secure legal representation; and
- (2) Whether a trial may only be conclusively found to be an abuse of process for lack of a legal representative after the trial has taken place.

[2] The only factual basis on which the two questions are premised is the lack of legal representation at the public expense for a person who has been charged with a criminal offence. In such circumstances, should the High Court: (1) dismiss an indictment as an abuse of process before trial; or (2) find a completed trial to be an abuse of process? In other words, does the lack of legal representation at the public expense mean that there is an abuse of process? To answer the two questions posed in the Reference, I will first examine the requirements of the right to legal representation under the **Constitution of Montserrat** ("the Constitution") and its role as part of the fair trial process. Secondly, briefly delineate the scope of the powers of the Director of Public Prosecutions under the Constitution. Thirdly, define abuse of process and outline the powers of the court when confronted with abuse of its processes. It is not intended to explore the three issues beyond what is necessary to answer the two questions because of the limited factual context in which the two questions arise and more importantly the fact that such issues are usually fact sensitive and usually require the court to take into account all the circumstances of a particular case.

² Cap 1.01 of the Laws of Montserrat.

The Right to Legal Representation

- [3] The right to legal representation in respect of persons charged with criminal offences is guaranteed by section 7(2)(d) of the Constitution which provides as follows:

“Provisions to secure protection of law

7. ...

(2) Every person who is charged with a criminal offence—

...

(d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice, or, when the interests of justice so require, by a legal representative at the public expense;”

- [4] Section 7(2)(d) of the Constitution is modelled after Article 6(3)(c) of the European Convention on Human Rights (“the Convention”) which provides as follows:

“Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”

- [5] In **Zdravko Stanev v Bulgaria**,³ the applicant was found guilty of forgery by the Nova Zagora District Court in Bulgaria. Instead of imposing a penal sentence, the Nova Zagora District Court replaced his criminal liability with an administrative fine and ordered him to pay the civil parties non-pecuniary damages. The applicant appealed to the Sliven Regional Court which upheld the lower court’s judgment. The Sliven Regional Court also refused to appoint counsel for the applicant. It noted that he could not afford one but held that the interests of justice did not require that he be provided with free legal assistance, as he held a university degree and the charges against him were not very serious.

³ Application No. 32238/04 .

[6] The applicant filed an application to the European Court of Human Rights (the “ECtHR”) where he complained that the Sliven Regional Court’s decision not to appoint counsel for him violated his rights under Article 6(3)(c) of the Convention. The applicant complained that as an unemployed person with no income, he could not afford to appoint his own defence counsel and that the interests of justice required that defence counsel be appointed on his behalf. The applicant submitted that the offence with which he was charged was serious and, pursuant to the Criminal Code of Bulgaria, carried a sentence of up to two years imprisonment and that the proceedings were sufficiently complex to require the appointment of counsel by the court.

[7] The state submitted that the applicant had not proved that he lacked the financial resources to appoint defence counsel. The state further submitted that the interests of justice did not require the provision of free legal assistance because: (1) the case brought against the applicant was neither serious nor complex; (2) the applicant was legally represented in the proceedings before the Nova Zagora District Court, and no new evidence was produced before the Sliven Regional Court; (3) the applicant was well-educated and in good health; and (4) the applicant did not face the threat of deprivation of liberty as the Nova Zagora District Court had already replaced the criminal liability with administrative liability.

[8] The ECtHR stated that:

“36. The Court reiterates that the right of those charged with criminal offences to free legal assistance is subject to two conditions: the persons concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that they be granted such assistance (see, among other authorities, *Pham Hoang v. France*, 25 September 1992, § 39, Series A no. 243)

...

38. As to whether the interests of justice required that the applicant receive free legal assistance in the form of court-appointed counsel, the Court recalls that it must have regard to the severity of the sanction which the applicant might incur, the complexity of the case and the personal situation of the applicant (see, for example, *Quaranta v. Switzerland*, 24 May 1991, § 33, Series A no. 205). The Court has held that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation

and if the defendant cannot pay for it himself, public funds must be available as of right (see *Benham v. the United Kingdom*, 10 June 1996, §§ 60-61, Reports of Judgments and Decisions 1996-III); however, that is not to say that public funds do not have to be available where deprivation of liberty is not at stake. (see, for example, *Barsom and Varli v. Sweden* (dec.), nos. 40766/06 and 40831/06, 4 January 2008).”

- [9] The ECtHR accepted that deprivation of liberty was not at issue in the proceedings before the Sliven Regional Court but that the fine imposed on the applicant and the damages he was required to pay were significant considering his financial situation. The ECtHR also noted that, although the applicant had a university degree and the proceedings were not complex, the relevant issues included the rules on admissibility of evidence, the rules of procedure, and the meaning of intent. The ECtHR also explained that the fact that the applicant, as an educated man, might have been able to understand the proceedings does not alter the fact that without the services of a legal practitioner, he was almost certainly unable to defend himself effectively. The ECtHR, therefore, accepted that the interests of justice demanded that, to receive a fair hearing, the applicant ought to have benefited from free legal representation during the proceedings before the Sliven Regional Court. Consequently, the ECtHR held that there was a contravention of Article 6(3)(c) of the Convention.

- [10] In **Caresana v United Kingdom**,⁴ the ECtHR noted that:

The Court observes at the outset that in the Convention system the right of a person charged with a criminal offence to free legal assistance is one element, amongst others, of the concept of a fair trial in criminal proceedings (see, inter alia, the *Pham Hoang v. France* judgment of 25 September 1992, Series A no. 243, p. 23, § 39, and the *Twalib v. Greece* judgment of 9 June 1998, Reports of Judgments and Decisions 1988-IV, pp. 1427-1428, § 46). Sub-paragraph (c) of Article 6 § 3 attaches two conditions to this right: that the individual does not have sufficient means to pay for legal assistance and that the interests of justice require it.

As to the former condition, it is recalled that the Court has considered it admissible, under the Convention, that the burden of proving a lack of sufficient means should be borne by the person who pleads it (see the *Croissant v. Germany* judgment of 25 September 1992, Series A no. 237-B, p. 35, § 37).

⁴ Application No. 31541/96.

- [11] The right to legal representation found in section 7(2)(d) of the Constitution would be a thing writ in water if the question of whether an accused who genuinely cannot afford legal counsel and the interests of justice so require is not provided with legal representation funded by the state. The right enshrined in section 7(2)(d) requires that: (1) the accused shows that he/she does not have sufficient funds to pay for legal assistance (the “**First Condition**”); and (2) it is in the interests of justice for the accused to be provided with legal representation at the public expense (the “**Second Condition**”). Section 7 of the Constitution seeks to secure the protection of the law for an accused and contains the essential requirements for a fair criminal trial. The right to legal representation in section 7(2)(d) is a core component of the fair trial obligations of the state.
- [12] Once these two conditions are satisfied, the state *must* pay for legal representation for a person charged with a criminal offence. The burden of proof is on the person charged with a criminal offence to show that he or she does not have the means to pay for legal assistance. It is not necessary that the First Condition is satisfied beyond a reasonable doubt; it is enough that there exist facts that indicate that the accused does not have the means to pay for his own legal representation. The Second Condition requires a consideration of all the circumstances including the complexity of the case, the nature of the charges, the gravity of the crime and the severity of the punishment that the accused faces.⁵ Also relevant to the Second Condition are the following: the personal characteristics of the accused, his or her nationality, age, background, lack of education or criminal background.⁶
- [13] Counsel for the Attorney General cites the decision in **Matthew Mcallisters and 6 others v Her Majesty's Advocate**⁷ where the appellants were indicted in the Sheriff Court in Glasgow, Scotland, on various charges under the United Kingdom Copyright, Design and Patents Act 1988 and the Trademarks Act 1994. The issue

⁵ See *Quaranta v Switzerland* Application No. 12744/87 at [33]-[34].

⁶ *Ibid* at [35].

⁷ [2009] HCJAC 107.

was whether the appellants could demonstrate that they would not receive a fair trial due to the refusal by the Scottish Legal Aid Board to sanction the employment of junior counsel. The High Court of Justiciary of Scotland explained that:⁸

“[7] We are satisfied that the proper test to apply in matters of this kind is that described in the case of *Transco Plc v Her Majesty's Advocate* 2004 SC (J) 29; 2004 SLT 995; 2004 SCCR 553, where it was held that the appellants' minute could succeed only if they could show that the proceedings would necessarily bring about a breach of the appellant's Convention rights, or would inevitably result in the proceedings as a whole being unfair in the convention sense. As put more particularly by Lord Hamilton in his opinion (at para [44]), the appellant in these circumstances can succeed only if he "can demonstrate that this is one of those 'rare and isolated cases' in which it can be said at this stage that proceeding to jury trial will 'inevitably' result in an infringement of the appellant's right to a fair trial.". As counsel for the second appellant was in effect arguing for a wholly different test to be applied in the present case, that would be enough to dispose of this appeal.

[8] However, we also conclude that on no possible view could the appropriate test be satisfied in the present case, particularly because the issues that may arise at the trial cannot at this time be identified. Counsel for the second appellant freely conceded that he could not say whether any of the matters he had pointed to as potential sources of unfairness or inequality of arms would in fact turn out to be so. He is not instructed in that matter. It is therefore impossible to assess what weight, if any, will attach to the fact that the complaint on which the indictments are based came from large organisations with interests to protect (presumably the same arguments would apply in cases where the complaint came from banks, building societies or insurance companies), that 1,700 items (all apparently of a similar nature) have to be considered, or that covert surveillance was used to obtain the information on which the charges were based. In the result, we are satisfied that the circumstances in the present case falls far below the proper test described by Lord Hamilton in *Transco Plc*.”

[14] It is important to remember that the High Court of Justiciary of Scotland dismissed the appeal on the basis only that, on the facts of the case, it could not be said that the appellants would not receive a fair trial because the issues that might arise at the trial could not be identified. It does not follow, as Counsel for the Attorney General

⁸ Ibid at [7]-[8].

contends, that dismissal of a count in the indictment would be a premature remedy to offer in relation to an accused person.

- [15] As mentioned above, the state has a *constitutional* obligation to provide legal representation for an accused person where both conditions are satisfied to engage section 7(2)(d) of the Constitution. The constitutional obligation is a free-standing one. It is not dependent on the state establishing and or maintaining a scheme, policy or budget for legal aid to all persons accused of crimes who do not have the means to pay for legal representation as Counsel for the Attorney General submits. The constitutional right to legal aid is not conditional on any of these matters – where it is properly invoked, the state must pay for the legal representation of the accused person.

The Director of Public Prosecutions

- [16] Section 49 of the Constitution establishes the office of Director of Public Prosecutions (the “DPP”) and outlines the powers of the DPP as follows:

“Director of Public Prosecutions

46. (1) There shall be a Director of Public Prosecutions for Montserrat, whose office shall be a public office.

(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so—

(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in Montserrat;

(b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or by any other person or authority.

(3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him or her in person or by officers subordinate to him or her acting under and in accordance with his or her general or special instructions.

(4) The powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority; but where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.
... ”

[17] The powers of the DPP under section 49(2) of the Constitution are wide and he or she enjoys a broad discretion in determining when or whether to institute, undertake, carry on, and discontinue criminal proceedings. In the exercise of those powers, the DPP is expected to exercise those powers fairly, reasonably, and in good faith. The DPP when exercising those wide powers must ensure that he or she keeps within the scope of the statutory powers, and once this is done his or her decision will not be subject to judicial review. Abuse of process can arise where the DPP in the exercise of his or her powers under section 49(2) of the Constitution acts in bad faith or for an improper motive. Abuse of process in the context of the broad powers exercisable by the DPP was explained by this Court in **Vynette A. Frederick v Commissioner of Police**⁹ as follows:

“Abuse of process

[11] An appropriate starting point is with the basic principle that it is for the prosecution, not the court, to decide whether prosecution should be commenced and if commenced whether it should continue or be terminated. This is a principle contained in the Saint Vincent Constitution Order 1979 ("the Constitution") by virtue of section 64 which creates the office of the Director of Public Prosecutions ("OPP") and expressly gives those powers to commence, continue or terminate criminal prosecutions in the exercise of an independent discretion.

[12] A corollary to the exercise of that power, however, is that the court still retains an inherent power to protect its own process from abuse even in circumstances where the exercise of the DPP's powers amounts to an abuse of its process. Halsbury's Laws, in referencing the court's power to stay proceedings for abuse of process, points out that the power can be exercised in many different circumstances. A well-recognised basis, apart from the case where the court concludes that a defendant cannot receive a fair trial, is where the court concludes that it would be unfair for the defendant to be tried. Among the examples cited is the deliberate and

⁹ SVGMCRAP2014/0009 (delivered 3rd August 2017, unreported).

improper manipulation by the prosecution of the criminal process so as to take unfair advantage of the defendant.

Analysis

[14] Unfairness and therefore abuse can arise in many different circumstances. The Court is entitled to weigh in any particular case all the facts and circumstances and conclude whether its process has been or is being abused. There can be no doubt as to the DPP's powers granted under the Constitution. Likewise, there can be no doubt that the DPP's power, although independently exercised, is subject to the check and balance of the court's supervisory powers over its own process to protect against its abuse. This inherent power is a fundamental underpinning to the due administration of justice.

[15] In *R v Walsall Justices, ex parte W* (a minor) the adjournment of a trial at the instance of the prosecution in order for a change in the law to take effect was considered as an abuse of process. In *CPS (Sussex) v Harvinder Singh Mattu*, the prosecution of related charges when a basis of plea wholly inconsistent with those charges had already been accepted was held to be an abuse of process. In *R v Maxwell*, a case considering whether to order a retrial following the quashing of a conviction on the grounds of serious misconduct by the police, Lord Dyson said:

"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, 74G, [1993] 3 All ER 138, (1993) 3 WLR 90) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 All ER 353, (1996) 1 WLR 104, 112F, [1996] 2 Cr App Rep 92)."

[18] In *Henry Lui et al v Attorney General of the Commonwealth of Dominica et al*,¹⁰ this Court explained the concept of "abuse of process" generally as follows:

¹⁰ DOMHCVAP2006/001 (delivered 22nd September 2008, unreported).

“Doctrine of abuse of process

[16] The doctrine of abuse of process is raised by both sides in relation to the substantive as well as the conspiracy charges against the appellants and as such a detailed analysis is required coupled with an application of the law. But what constitutes abuse of process?

[17] In Halsbury’s Laws of England it is stated that:

“An abuse of process of the Court arises where its process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or simply, where the process is misused.

[18] As to where the jurisdiction resides to prevent abuse of process, Lord Justice May in *R v Telford Justices Ex Parte Badham* had this to say:

“In modern times the law of abuse of process can be said to be derived from the speeches in *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254. Lord Morris said ([1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301):

‘There can be no doubt that a court which is endowed with a particular jurisdiction has powers to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any thwarting of its process.’

This general principle was treated as applicable to justices holding a summary trial by Lord Parker CJ, with whom Diplock LJ and Ashworth J agreed in *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467:

‘So far as the ground on which they did dismiss the information is concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.’

[19] In *Director of Public Prosecutions v Humphrey* even though the House of Lords was concerned with the question of estoppel, both Lord Salmon and Lord Edmund Davies did say, obiter, that there must always be a residual discretion to prevent anything which savours of abuse of process.

[20] At a later stage, Lord Diplock in *Hunter v Chief Constable of West Midlands* stated the following:

“My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although

not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process may arise are very varied, those which give rise to an instant appeal must surely be unique. It would in my view, be most unwise if this House were to use this occasion to say that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power”

[21] In sum, therefore, based on the foregoing, it may be said that any court has an inherent power to prevent the misuse of its procedure. Such misuse may be of such a nature that it would be unfair to a party seeking justice, or the use of the procedure may be such as to bring the administration of justice into disrepute. Further, the circumstances in which abuse of process may arise are many and varied.”

[19] I distill the following principles from the quotations from the two above-mentioned decisions of this Court. First, it is not the function of the court to determine whether a prosecution should be commenced and if commenced whether it should continue or be terminated. That is a matter solely for the DPP. Second, abuse of process arises where the court process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or simply, where the process is misused. Third, the court has an inherent jurisdiction and duty (rather than wide discretion) to prevent its processes from being abused which can take many forms. Fourth, the court can stay criminal proceedings if it is satisfied that there has been an abuse of process. Fifth, the court’s wide power to stay proceedings can also be exercised where the court concludes that a defendant cannot receive a fair trial or that it would be unfair for the defendant to be tried. Sixth, the court has the power to stay proceedings where it offends the court’s sense of justice and propriety to be asked to try an accused in the circumstances of any particular case.

The Appropriate Remedy

[20] The first question asks whether, in view of the accused’s right to legal representation under section 7(2)(d) of the Constitution the High Court may determine, before trial on indictment takes place, **that a count on indictment may be dismissed** as an

abuse of process if the accused does not receive financial assistance from the State to secure legal representation. The question is a narrow one asking whether a specific remedy is available in circumstances where the right to legal representation under section 7(2)(d) of the Constitution is properly engaged. Is dismissal of the indictment the only remedy or one of many remedies a court may fashion in respect of any possible infringement of the right to legal representation in section 7(2)(d) of the Constitution?

- [21] This Court in **Urban St. Brice v Attorney General of Saint Lucia**¹¹ had to consider whether the appellant was entitled to, among other things, a remedy of quashing the indictment or stay of proceedings if his constitutional right to a fair hearing within a reasonable time under section 8(1) of the Constitution of Saint Lucia had been infringed. Section 8 of the Constitution of Saint Lucia, like section 7 of the Constitution of Montserrat, is headed “**Provisions to secure protection of law**”. The Court of Appeal, disagreeing with the trial judge, held that the overall delay of approximately 18 years, between the time of the appellant’s arrest and charge in November 2002 and the hearing of the appeal in 2020 without the murder charge having been finally heard and determined, lead to the conclusion that the overall delay was so great that the reasonable time guarantee found in section 8(1) of the Constitution had been breached.
- [22] The Court of Appeal, at paragraph 29, explained the applicable principles relating to constitutional remedies in this context as follows: First, section 16(2)(b) (the enforcement section) of the Constitution is flexible in terms and admits of a wide discretion enabling the court to deploy an appropriate remedy to meet the justice of the case. Second, the section empowers the court to make declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of the right violated. Third, when devising an appropriate remedy, the court must consider all the circumstances of the case.

¹¹ SLUHCVP2018/0036 (delivered 31st July 2020, unreported).

Fourth, a declaration by the court will articulate the fact of the violation of the right but, in some cases, more will be required than words.

[23] The Court was of the view that on the facts merely granting a declaration of the violation of the reasonable time guarantee would be inadequate given the circumstances of this case – more would therefore be required. The Court then explained the principles applicable to a stay of proceedings as follows:

“[30] Ms. DaBreo has advocated for a permanent stay of proceedings. The guiding principles applicable to the discretionary jurisdiction to grant a stay in respect of criminal proceedings are now addressed:

(i) The grant or refusal of a stay engages the exercise of the court’s discretion. Prima facie, it is the duty of a court to try a person who is charged before it with an offence which the court has power to try; therefore, the jurisdiction to grant a stay must be exercised carefully, sparingly and only for compelling reasons: see *R v Horseferry Road Magistrates Court, ex p Bennett*.

(ii) The staying of criminal proceedings requires clear and compelling justification. Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule: see *R v DS*.

(iii) There is an undoubtedly strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Therefore, ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort: see *The Queen v Scott Crawley and Ors*.

(iv) Given the high level of public interest in the determination of very serious crimes, it will only be in exceptional circumstances that a person accused of murder will be able to obtain the remedy of a permanent stay or dismissal for a breach of the reasonable time guarantee: see *Gibson v The Attorney General of Barbados*.

(v) The public interest in the final determination of criminal charges, require that a charge should not be stayed or dismissed if any lesser remedy would be appropriate in all the circumstances: see *Attorney General’s Reference (No. 2 of 2001)*.

(vi) An appropriate remedy should be afforded for a breach of the reasonable time guarantee, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair, or (b) it was unfair to try the defendant at all: see *Boolell v The State*.

(vii) The category of cases in which it would be unfair to try a defendant include, but is not limited to, cases of bad faith, unlawfulness and cases (of which *Darmalingum v The State*²³ is an example) where the delay is of such an order as to make it unfair that the proceedings against the defendant should continue: see Attorney General's Reference (No. 2 of 2001). In that case, Lord Bingham opined that while it would be unwise to attempt to describe the category of cases in which it would be unfair to try a defendant in advance, such cases will be recognised when they appear. His Lordship noted that such cases will be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's right under the European Convention of Human Rights. (Citations omitted)"

[24] As the Court in **St. Brice** noted at paragraph 31, the threshold for a stay of criminal proceedings is undoubtedly very high and that the remedy is exceptional; it is one of last resort and must be used sparingly, carefully and for compelling reasons. On the facts, the Court accepted that the circumstances relating to the appellant made it one of those exceptional cases where he ought to obtain the remedy of a permanent stay of the criminal proceedings to vindicate the breach of the reasonable time guarantee under section 8(1) of the Constitution of Saint Lucia. The Court did not need to consider whether the indictment should be quashed which was rendered moot considering the remedy of permanent stay already ordered by the Court. However, the Court noted that there was no need for quashing the indictment because the indictment was properly preferred against the appellant.

[25] Once an indictment is properly preferred against an accused person it stands unless the alleged irregularity relates to the indictment itself. A breach of the right to legal representation in section 7(2)(d) of the Constitution does not relate to or concern the indictment per se but does affect the fairness of the trial to which the indictment

relates. Ward J in **The Queen v Rey Rodriguez and another**¹² explained¹³ that the current understanding of the court's power to quash an indictment was expressed (at paragraph D1. 110) in Blackstone Criminal Practice 2020 as follows:

“Circumstances in which to Bring a Motion

A motion to quash may be brought in any of three circumstances: (a) where the indictment is bad on its face (e.g., for duplicity or because the particulars of a count do not disclose an offence known to law, as in *Yates* (1872) 12 Cox C 233). (b) Where the indictment (or a count thereof) has been preferred otherwise than in accordance with the provisions of the Administration of Justice (Miscellaneous Provisions) Act 1933, s. 2. Such an indictment must be quashed because it is preferred without authority (*Lombardi* [1989] 1 All ER 992). (c) Where the indictment contains a count for an offence in respect of which the accused was not sent for trial and the material served under the regulations for the service of the prosecution case after he has been sent does not disclose a case to answer for that offence (*Jones* (1974) 59 Cr App R 120, a case decided in relation to committal documents).”

Ward J also cited the following from Archbold's Criminal, Pleading, Evidence and Practice (2015 Edition) (at para. 4-74) under the heading, **“Limited Discretionary Power to Prevent Prosecution Proceeding”**:

“Once an indictment is before the court the accused must be arraigned and tried unless (a) motion to quash it is held defective in substance or form; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General which cannot be done before the indictment is found; or (d) the indictment discloses an offence which a particular court has no jurisdiction to try, per Lord Goddard C.J. in *R. v Chairman of London County Sessions, ex. p. Downes* [1954] 1 Q.B. 1.

Where a prosecution is properly brought, a judge has no power to prevent the prosecution from presenting their evidence on the basis that he considers it unlikely there will be a conviction: Attorney General's Reference (No. 2 of 2000) [2001] Cr. App. R. 503, CA.”

Any issue concerning the indictment itself is a matter for consideration by the trial judge seized with the criminal proceedings. As the passages above make clear, the power of the court to quash an indictment is grounded on matters relating to the

¹² BVIHCR2017/0016 (delivered 17th February 2020, unreported).

¹³ *Ibid* at para 29.

indictment itself. In the three circumstances outlined above where a court may quash an indictment, they do not involve any abuse of process that would justify a court issuing a stay of the criminal proceedings.

Conclusion and Answers

- [26] Abuse of process specifically relates to any way in which the court process is used for an improper purpose or in bad faith. It is a misuse of the judicial process for it to be utilized for a purpose other than which it was intended to serve. The only relevant fact mentioned in the Reference is that an accused does not have legal representation at the public expense. That fact alone would not justify a finding that there is an abuse of process if a trial were to take place. It does not amount to using the court's processes for an improper purpose. This Court in **Frederick** explained that it is for the prosecution, not the court, to decide whether prosecution should be commenced and if commenced whether it should continue or be terminated. Even then, the court still has the inherent jurisdiction to prevent its processes from being misused. Where a prosecution is brought for an improper purpose, the court has the power to stay the proceedings for abuse of process. Additionally, the court can also stay criminal proceedings where it will be impossible to give the accused a fair trial.
- [27] Where an accused satisfies the requirements (the two conditions explained above) for legal representation at the public expense as guaranteed under section 7(2)(d) of the Constitution, it would be impossible to give the accused a fair trial if legal representation is not provided at the public expense. The court therefore can exercise its inherent power to stay temporarily or permanently any trial if the state refuses to provide legal representation where the two conditions for invoking section 7(2)(d) of the Constitution are satisfied. The court can grant that stay prior to the commencement of any trial or during a trial until such legal representation is provided at the public expense. After a trial, the court is in a better position to assess the effect of any breach of section 7(2)(d) of the Constitution on the conduct of the trial itself to determine whether it was fair and grant any appropriate remedy.

[28] I would accordingly answer the two questions as follows:

a. Reference - Question 1:

Whether, in view of the accused's right to legal representation under section 7(2)(d) of the Constitution of Montserrat (Cap.1.01), the High Court may determine, before trial on indictment takes place, that a count on indictment may be dismissed as an abuse of process if the accused does not receive financial assistance from the State to secure legal representation.

b. Answer to Question 1:

The refusal to provide legal representation at the public expense by itself does not amount to an abuse of process warranting dismissal of an indictment or a count on an indictment prior to trial. The court nonetheless has an inherent power to stay proceedings prior to or during trial if no legal representation at the public expense is provided to the accused (where both conditions required for section 7(2)(d) of the Constitution to be engaged are satisfied) and that it is impossible for an accused to have a fair trial. The court may fashion any other appropriate remedy to vindicate the breach of the right to legal representation.

c. Reference - Question 2:

Whether a trial may only be conclusively found to be an abuse of process for lack of a legal representative after the trial has taken place.

d. Answer to Question 2:

The refusal to provide legal representation at the public expense by itself does not amount to an abuse of process after the trial. Where a trial takes place and no legal representation at the public expense is provided to the accused (where both conditions required for section 7(2)(d) to be engaged are satisfied) the court may determine whether the accused had a fair trial. The court may fashion an appropriate remedy to vindicate the breach of the right to legal representation.

[29] I am grateful for the assistance provided by the Counsel for the Attorney General and the Interested Parties.

[30] **PEREIRA CJ:** I have had the benefit of reading this opinion in draft and I am in full agreement with the answers given to the questions in the Reference which the Court considered appropriate to answer.

I concur.
Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar